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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1125 OF 2002

Sayyad Abdul Rajak Shaikh ... Appellant

V/s

The State of Maharashtra ... Respondent

Mr. R. Sathyanarayanan, Advocate appointed for the appellant/accused.

Mrs. M.M. Deshmukh, A.P.P. for the respondent State.

CORAM: S. B. MHASE &
SMT. NISHITA MHATRE, JJ.

DATED: 22ND FEBRUARY, 2007.

ORAL JUDGMENT (PER SMT. MHATRE, J.):

1. The appellant has been convicted and sentenced under Section 302 of the Indian Penal Code for having murdered his wife Arifabi, by the Additional Sessions Judge, Solapur by his judgment and order dated 22.10.2001 in Sessions Case No. 45 of 2001.

2. The prosecution has contended that Arifabi had married the appellant about 8 months prior to her death. After their marriage, they were residing in two rooms. On 29.9.2000 at about 9.00 p.m., the appellant came home

in an intoxicated condition and asked the victim to lie down. He poured kerosene on her and set her on fire with a lighted oil lamp. The victim raised an alarm. The appellant has sustained burns on his hands and face. One of the neighbours who has been examined as PW-1 questioned the victim as to the cause of her burns when she disclosed that it was her husband who was responsible for her plight. She disclosed that her husband had suspected her fidelity and had, therefore, set her on fire. The prosecution alleges that the husband i.e. the appellant had admitted Arifabi to hospital, immediately after the incident. However she succumbed to the burn injuries on 3.10.2000, after her dying statement was recorded. Two dying declarations were recorded, one by the Special Executive Magistrate and the other by the Police Head Constable. On the basis of these dying declarations which were recorded on 30.9.2000, the appellant was arrested and initially charged under Section 307. After the death of Arifabi, the charge was enhanced and the appellant was prosecuted for having committed an offence punishable under Section 302 of the Indian Penal Code.

3. The prosecution has relied on 7 witnesses to support its case against the appellant. The first witness is the neighbour who has deposed regarding the cause of the

burns sustained by Arifabi. She has stated in her deposition that she had heard Arifabi shout and had seen her ablaze. She has disclosed to her that the appellant had set her on fire since he suspected her character. This witness has also stated that the victim was hospitalized by the appellant and other neighbours. She has admitted that the appellant had sustained some burn injuries. The evidence of this witness does not inspire confidence as her testimony is vacillating.

4. The next witness examined for the prosecution is the panch witness who has proved the spot panchanama. A kerosene oil can and an oil lamp and burnt pieces of cloth were found at the spot of offence. A stove was also seen in the house. However, it was not seized by the police during the investigation.

5. The medical officer who conducted the post-mortem examination on the corpse of Arifabi was examined as PW-3. He has opined that the victim had sustained 70% burns which were ante-mortem. The cause of death, according to this witness, was toxaemia due to the burn injuries. The defence had tried to suggest to this witness that, had sufficient and proper care been available to the victim, she would have survived. This suggestion has been denied by the witness.

6. PW-4 is the investigating officer. He has admitted that he did not attach the stove which was found at the scene of offence i.e. the appellant's house. While other articles like a kerosene can, an oil lamp and burnt pieces of cloth were seized, they were not sent for analysis to the chemical analyzer.

7. PW-5 is the Special Executive Magistrate who has recorded the dying declaration of the victim on 30.9.2000 at 3.00 a.m. The witness has stated that he had ascertained from the medical officer treating the victim i.e. PW-6, that the victim was conscious and fit to have her statement recorded. This dying declaration is at Exh.19. The witness has taken all precautions which are necessary before recording the dying declaration including recording it in the absence of other persons. He has stated that, while the victim had given her statement in Hindi, he translated the same and recorded it in Marathi.

8. PW-6, the doctor, who was treating the victim has stated that when the victim was admitted to hospital, he recorded her case history as narrated by her. She had disclosed that her husband had poured kerosene on her and had set her on fire with a lighted oil lamp. The

witness has deposed that the appellant had admitted the victim to hospital. The doctor has stated that he had certified that the victim was in a fit condition to have a statement recorded by the Special Executive Magistrate as well as the police head constable who recorded the earlier dying declaration at 2.40 a.m.

9. PW-7 is the police head constable who was informed by the hospital that the victim had been admitted with the serious burns. He rushed there and recorded her statement which has been treated as the F.I.R. He has also recorded the statement in Marathi after translating the narration of the victim which was made in Hindi.

10. With the assistance of the learned advocate for the appellant and the learned Assistant Public Prosecutor, we have perused the material on record. We have also perused the evidence and other material on record. We are unable to uphold the conviction and sentence imposed on the appellant under Section 302 of the Indian Penal Code.

11. The dying declarations recorded by PW-7 and PW-5 have no material discrepancies or contradictions. In fact, the narration in both these statements is consistent, that the appellant made the victim lie down,

poured kerosene on her and set her ablaze by using a lighted oil lamp. These statements have been recorded by PW-7 and PW-5 after ascertaining from PW-6, the doctor treating the victim that she was fully conscious and able to have a statement recorded. It was argued on behalf of the appellant that although the victim had narrated the incident in Hindi, the dying declarations were recorded in Marathi by PW-7 and PW-5. This, according to the learned advocate is unacceptable in law. The learned advocate submits that, in any event the victim could not have understood the contents of the dying declarations as the statements contained therein were in a language unknown to her. This submission of the learned counsel on behalf of the appellant cannot be accepted. The statements have no doubt been recorded in Marathi. They have been proved by the witnesses PW-7 and PW-5. There is no evidence on record to indicate that they were incorrectly translated from Hindi to Marathi while recording the same. There is also no material on record to demonstrate that the victim had not stated what has been recorded by these witnesses. In fact, the appellant has been unable to impeach the testimony of these witnesses. Besides the two recorded statements, there is an oral statement made by the victim to PW-1. Considering these three statements together, we have no manner of doubt that they are

genuine and credible. The prosecution has thus been able to prove that the victim died a homicidal death and we are in agreement with the findings recorded by the Sessions Court in that regard.

12. However, the prosecution has not been able to prove that an offence punishable under Section 302 has been committed by the appellant. This is obvious from the fact that it was the appellant who admitted his wife, the victim to hospital. He had sustained burns on his hands and face while trying to rescue her after setting her on fire. All these factors indicate that after the victim was ablaze, the appellant was filled with remorse and had tried to save the victim. However, the intention of the appellant to cause bodily injury which was likely to cause death has been established by the prosecution. We are of the view that the appellant should be convicted under Section 304 Part-I and sentenced to rigorous imprisonment for 10 years.

13. In the result, the conviction and sentence of the appellant under Section 302 of the Indian Penal Code is set aside. The appellant is convicted under Section 304 Part I of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years.

14. The appeal is partly allowed and disposed of accordingly.

(SMT. NISHITA MHATRE, J.) (S.B. MHASE, J.)